Muhamad Elias bin Muhamed Yusoff v Public Prosecutor

HIGH COURT (PULAU PINANG) — CRIMINAL APPEAL NO 42S-28–6 OF 2015
LIM CHONG FONG JC
29 JULY 2016

Criminal Law — Sentence — Appeal against sentence — Appellant sentenced to two strokes of whipping for offence of robbery under ss 392 and 397 of the Penal Code — Whether whipping mandatory or discretionary pursuant to ss 392 and 397 of the Code — Whether there was conflict between English language and Bahasa Malaysia versions of the Code on imposition of whipping — Penal Code ss 392 & 397

This was an appeal by the appellant against the whipping sentence imposed by the sessions court against him for the offence of robbery under ss 392 and 397 of the Penal Code ('the Code'). The appellant submitted that whipping was discretionary as provided under ss 392 and 397 of the Code. The appellant also submitted that there was a conflict between the English language and Bahasa Malaysia versions of the Code on the imposition of whipping pursuant to ss 392 and 397 thereof. In reply, the respondent submitted that whipping was mandatory as plainly provided under ss 392 and 397 of the Code.

Held, dismissing the appeal; and affirming both the conviction and sentence of the sessions court:

(1) There is no Bahasa Malaysia version of the Code that was published by the Commissioner of Law Revision concurrently with the publication of the Penal Code (Act 574). The 'Kanun Keseksaan' relied upon by the appellant was privately published by the International Law Book Services but that was not an authoritative version that could be relied upon. Thus, there was only the English version of the Code that was applicable. In the premises, it was plain that phrase 'shall be liable to whipping/be whipped' in ss 392 and 397 of the Code connoted mandatory whipping, hence, the sessions court was not in error in having imposed whipping on the appellant (see paras 12–13).

(2) It is trite law that the sentence imposed by the subordinate court ought not to be disturbed unless it is manifestly excessive or inadequate. In the circumstances, the court found that the two strokes of whipping meted out by the sessions court was not in any way excessive. The health of the appellant was not a relevant consideration by reason of ss 290 and 291 of the Criminal Procedure Code (see paras 14 & 17–18).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu terhadap hukuman sebatan yang dikenakan oleh mahkamah sesyen terhadapnya bagi kesalahan merompak di bawah ss 392 dan 397 Kanun Keseksaan ('Kanun'). Perayu berhujah bahawa sebatan adalah budi bicara seperti yang diperuntukan di bawah ss 392 dan 397 Kanun. Perayu juga berhujah bahawa terdapat konflik di antara versi Bahasa Inggeris dan Bahasa Malaysia Kanun atas pengenaan sebatan berikutan ss 392 dan 397. Dalam menjawab, responden berhujah bahawa sebatan adalah mandatori seperti yang diperuntukan dengan jelas di bawah ss 392 dan 397 Kanun.

Diputuskan, menolak rayuan; dan mengesahkan kedua-dua sabitan dan hukuman mahkamah sesyen:

(1) Tidak terdapat versi Bahasa Malaysia Kanun yang diterbitkan oleh Suruhanjaya Semakan Undang-Undang serentak dengan penerbitan Kanun Keseksaan (Akta 574). 'Kanun Keseksaan' yang digunakan oleh perayu adalah diterbitkan secara persendirian oleh International Law Book Services tetapi bukan versi autoritatif yang boleh digunakan. Oleh itu, hanya versi Bahasa Inggeris Kanun yang boleh digunapakai. Oleh itu, ia adalah jelas bahawa frasa 'shall be liable to whipping/be whipped' dalam ss 392 dan 397 Kanun membawa sebatan mandatori, maka, mahkamah sesyen tidak salah dalam mengenakan sebatan ke atas perayu (lihat perenggan 12–13).

(2) Adalah undang-undang nyata bahawa hukuman yang dikenakan oleh mahkamah rendah patut tidak diganggu kecuali ia jelas berlebihan atau tidak mencukupi. Dalam keadaan, mahkamah mendapati bahawa dua sebatan rotan yang dikenakan oleh mahkamah sesyen tidak dalam apa-apa cara berlebihan. Kesihatan perayu bukan pertimbangan relevan atas sebab ss 290 dan 291 Kanun Tatacara Jenayah (lihat perenggan 14 & 17–18).]

Notes

For cases on appeal against sentence, see 4(3) Mallal's Digest (5th Ed, 2015) paras 3910–3951.

Cases referred to

Jayanathan v PP [1973] 2 MLJ 68, FC (refd)
Nazri bin Marzuki v PP (Criminal Appeal No 42S-8–2 of 2015) (unreported), HC (refd)
PP v Sathiaseelan a/l Periyasamy & Anor [2010] 8 MLJ 710; [2010] 2 CLJ 890, HC (refd)
PP v Leonard Glenn Francis [1989] 2 MLJ 158, HC (refd)
PP v Man bin Ismail [1939] 1 MLJ 207 (refd)
PP v Mohamed Nor & Ors [1985] 2 MLJ 200b, SC (refd)

Legislation referred to

Criminal Procedure Code ss 290, 291, 294
National Language Acts 1963/1967 ss 6, 7
Penal Code ss 392, 397
Prevention of Crime Ordinance 1959 s 15(4)
Revision of Laws Act 1968 s 10(2)

V Parthipan (V Parthipan & Khor) for the plaintiff.
Lim Cheah Yit (Penang State Legal Advisor's Office) for the respondent.

Lim Chong Fong JC:

INTRODUCTION

[1] This is an appeal against the decision of the sessions court dated 10 June 2015. The appellant was found guilty as charged and the sessions court imposed an imprisonment sentence of six years and two strokes of whipping.

[2] The charge that was brought against the appellant read as follows:

> Bahawa kamu pada 16hb. September 2013 jam lebih kurang 4.30 pagi di dalam tandas Majlis Perbandaran Pulau Pinang di dalam Daerah Timur Laut, dalam Negeri Pulau Pinang telah melakukan rompak iaitu wang tunai RM 400.00, dua buah telefon bimbit jenis Samsung Galaxy 4 dan Samsung Corby, milik Norhaizam bin Borhan, Kpt: 791009-07-5433 dengan bersenjataan pisau kerambit. Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 392 Kanun Keseksaan dan dibaca di bawah seksyen 397 Kanun Keseksaan yang sama.

[3] When the appeal first came up for hearing before me on 27 April 2016, the appellant withdrew his appeal on the conviction and imprisonment sentence. Hence the remainder of the appeal was only on the whipping sentence. An interesting point of law emerged as to whether whipping is a mandatory sentence pursuant to ss 392 and 397 of the Penal Code and I adjourned the appeal to allow the parties to undertake a detail research on that point.

[4] The appeal was re-convened on 13 July 2016 and I heard oral submissions from counsel. I thereafter adjourned the appeal for deliberation.

[5] I now give my decision with my supporting grounds hereinbelow.

A CONTENTION OF THE PARTIES

[6] DPP Lim Cheah Yit of counsel for the respondent submitted that whipping is mandatory as plainly provided in ss 392 and 397 of the Penal Code with emphasis added:

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> 392 Punishment for robbery
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> Whoever commits robbery shall be punished with imprisonment for a term which may extend to fourteen years, and *he shall also be liable to fine or to whipping*.
>
> 397 Robbery when armed or with attempt to cause death or grievous hurt
>
> C If at the time of committing or attempting to commit robbery, the offender is armed with or uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, such offender *shall be liable to be whipped*, in addition to any other punishment to which he may be liable under any other section of this Code.

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[7] On the other hand, Mr V Parthipan of counsel for the appellant submitted that whipping is discretionary as provided in ss 392 and 397 of the *Kanun Keseksaan* (Bahasa Malaysia version of the Penal Code) with emphasis added:

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> 392 Seksaan bagi rompak
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> Barang siapa melakukan rompak hendaklah diseksa dengan penjara selama tempoh yang boleh sampai empat belas tahun, dan *bolehlah* juga dikenakan denda atau sebat.

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> 397 Rompak dan bersenjata atau rompak serta mencuba menyebabkan kematian atau cedera parah
>
> Jika pada waktu melakukan atau mencuba melakukan rompak, pensalah itu bersenjata atau menggunakan apa-apa senjata maut, atau menyebabkan cedera parah kepada mana-mana orang, atau mencuba menyebabkan kematian atau cedera
>
> G parah kepada mana-mana orang , maka pensalah itu *bolehlah* dikenakan sebat, selain dari apa-apa seksaan yang ia boleh dikenakan di bawah mana-mana lain seksyen kanun ini.

He therefore pointed out that there is a conflict between the English language
H and Bahasa Malaysia versions of the Penal Code on the imposition of whipping pursuant to ss 392 and 397 thereof.

[8] In addition, Mr Parthipan cited the Federal Court case of *Jayanathan v Public Prosecutor* [1973] 2 MLJ 68 where it has been interpreted that 'shall be
I liable to imprisonment' in s 15(4) of the Prevention of Crime Ordinance 1959 was not an absolutely mandatory requirement and the president of the sessions court was still entitled to act under s 294 of the Criminal Procedure Code. However, he was candid to add that he wasn't suggesting the provisions in s 294 be invoked herein on binding over for first offenders.

FINDINGS OF THE COURT

[9] It is common ground that 'boleh' when translated means 'may' see *Kamus Dwibahasa* published by the Dewan Bahasa dan Pustaka.

[10] Sections 6 and 7 of the National Language Acts 1963/1967 provide as follows:

> 6 Authoritative text of laws
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> The texts —
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> (a) of all Bills to be introduced or amendments thereto to be moved in Parliament or the Legislative Assembly of any State;
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> (b) of all Acts of Parliament and all subsidiary legislation issued by the Federal Government;
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> (c) of all Enactments and subsidiary legislation issued by any State Government; and
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> (d) of all Ordinances promulgated by the Yang di-Pertuan Agong, shall be in the national language and in the English language, the former being authoritative unless the Yang di-Pertuan Agong otherwise prescribes generally or in respect of any particular law or class of laws.
>
> 7 Written laws enacted prior to 1st September 1967
>
> (1) Where any written law enacted before the first day of September 1967, has been translated into the national language the Yang di-Pertuan Agong may prescribe the translation of that law to be authoritative.
>
> (2) Nothing in section 6 shall apply to the amendment of any written law enacted before the first day of September 1967, until that written law has been translated into the national language and the translation has been prescribed to be authoritative.

[11] I noticed that the Penal Code (FMS Cap 45) was revised in 1997 pursuant to the Revision of Laws Act 1968 and is now the Penal Code (Act 574). In the premises, s 6 of the National Language Acts 1963/1967 applies by reason of s 10(2) of the Revision of Laws Act 1968 that reads:

> 10 Publication of revised law
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> ...
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> (2) On and after the date from which a revised law comes into force, such revised law shall be deemed to be and shall be without any question whatsoever in all courts and for all purposes whatsoever the sole and only proper law in respect of matters included therein and in force on that date.

Accordingly, the *Kanun Keseksaan* would prima facie take precedent over the Penal Code (unless otherwise prescribed by the Yang di-Pertuan Agong) in the event of an ambiguity as is apparent here.

[12] However upon further research, I discovered that the Commissioner of Law Revision has to date not officially published the *Kanun Keseksaan*. In other words, there is no Bahasa Malaysia version of the Penal Code that was published concurrently with the publication of the Penal Code (Act 574). This is unlike, for example, the Akta Senjata Api (Penalti Lebih Berat) 1971 (Akta 37) that was published concurrently with the Firearms (Increased Penalties) Act 1971 (Act 37). The *Kanun Keseksaan* relied upon by the appellant here is one privately published by the International Law Book Services but that is not an authoritative version that can be relied upon. For the purposes of this appeal, there is therefore only the English language version of the Penal Code that is applicable.

[13] In the premises save and unless s 294 of the Criminal Procedure Code is invoked, which is not the case here, it is plain that the phrase 'shall be liable to whipping/be whipped' in ss 392 and 397 respectively connotes mandatory whipping: see *Public Prosecutor v Man bin Ismail* [1939] 1 MLJ 207 that was approved by the Federal Court in *Jayanathan v Public Prosecutor*. The sessions court was therefore not in error at all in having imposed whipping on the appellant.

[14] Two strokes of whipping were meted out here. It is trite law that the sentence imposed by the subordinate court ought not to be disturbed unless it is manifestly excessive or inadequate. In this respect, Abdul Hamid CJ (later LP) held as follows in the Supreme Court case of *Public Prosecutor v Mohamed Nor & Ors* [1985] 2 MLJ 200b:

> In this regard we would observe that it is the established principle that an appellate court should be slow to interfere or disturb with a sentence passed by the court below unless it is manifestly wrong in the sense of being illegal or of being unsuitable to the proved facts and circumstances. And the mere fact that another court might pass a different sentence provides no reason for the appellate court to interfere if the court below applies the correct principles in the assessment of the sentence.

[15] I have recently held as follows in *Nazri bin Marzuki v Public Prosecutor* (Criminal Appeal No 42S-8–2 of 2015) (unreported) in respect of the appeal on the conviction and sentence for the same offence:

> I am mindful that robbery, particularly armed robbery is becoming rampant in this country and towards this end, I must not loose sight of the public interest need for deterrence. This is the overriding consideration notwithstanding that the appellant is a first time offender and the sum involved in the robbery is pittance. Consequently, I am of the view that the sentence of four years imprisonment with one stroke of whipping imposed upon the appellant is warranted and adequate and I hope that the appellant will be repentant after serving the sentence.

[16] In that case, the armed robbery also involved using a sickle to rob RM40 from the victim in a convenience shop.

[17] In the circumstances, I do not think that the whipping of two strokes meted out by the sessions court was in any way excessive: see also *Public Prosecutor v Sathiaseelan a/l Periyasamy & Anor* [2010] 8 MLJ 710; [2010] 2 CLJ 890.

[18] I am mindful Mr Parthipan also submitted that I should take into account the health of the appellant who is suffering from kidney problems. However, there is no proper medical evidence of the same in the record of appeal before me. In any event, this is not a relevant consideration here by reason of ss 290 and 291 of the Criminal Procedure Code that provide:

290 Medical Officer's certificate required

(1) The punishment of whipping shall not be inflicted unless a Medical Officer is present and certifies that the offender is in a fit state of health to undergo such punishment.

(2) If, during the execution of a sentence of whipping, a Medical Officer certifies that the offender is not in a fit state of health to undergo the remainder of the sentence the whipping shall be finally stopped.

(3) Where whipping is inflicted under section 293 a Medical Officer need not be present, but such whipping shall not be inflicted unless it appears to the Court that the offender is in a fit state of health to undergo the same.

291 Procedure if whipping cannot be inflicted

(1) In any case in which under section 290 a sentence of whipping is wholly or partially prevented from being executed the offender shall be kept in custody till the Court which passed the sentence can revise it, and the said Court may in its discretion either remit the sentence or sentence the offender instead of whipping, or instead of so much of the sentence of whipping as was not executed, to imprisonment for a term which may extend to twenty-four months, which may be in addition to any other punishment to which he has been sentenced for the same offence.

(2) Nothing in this section shall be deemed to authorise any Court to inflict imprisonment for a term exceeding that to which the accused is liable by law or which the said Court is competent to inflict.

I observed that this was also the position adopted in *Public Prosecutor v Leonard Glenn Francis* [1989] 2 MLJ 158.

CONCLUSION

[19] For the foregoing reasons, I hereby dismiss the appeal. Both the conviction and sentence of the sessions court dated 10 June 2015 are affirmed.

A *Appeal dismissed; both conviction and sentence of sessions court affirmed.*

Reported by Dzulqarnain Ab Fatar

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